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ONE HUNDRED THIRTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

July 17, 2013

To: **Committee on Energy and Commerce Democratic Members and Staff**

Fr: **Committee on Energy and Commerce Democratic Staff**

Re: **Subcommittee on Oversight and Investigations Hearing on "Patient Protection and Affordable Care Act: Implementation in the Wake of Administrative Delay."**

On Thursday, July 18, 2013, at 1:30 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations will hold a hearing titled, "Patient Protection and Affordable Care Act: Implementation in the Wake of Administrative Delay."

I. BACKGROUND INFORMATION

The Affordable Care Act (ACA) is a comprehensive law that addresses chronic problems that have plagued the U.S. health system for decades.[1] These include: the high number of uninsured Americans, the rapidly increasing costs of coverage and care, insurance company abuses like rescissions of health insurance coverage and denial of care to those who suffered from accidents or preexisting conditions, and the waste of billions of dollars in unnecessary administrative costs. Prior to passage of the Affordable Care Act (ACA), health care costs rose rapidly for employers, workers, and individual consumers alike. Many employers shifted costs to their employees or dropped coverage entirely; the percentage of firms offering coverage fell from 68% in 2001 to 60% in 2011.[2] The average family premium for an employer-sponsored plan doubled, increasing from less than $7,000 to more than $14,000 in the decade before

[1] Pub. L. No. 111-148.

[2] Kaiser Family Foundation, *Employer Health Benefits Survey 2010 Annual Survey* (online at ehbs.kff.org/pdf/2010/8085.pdf) and Kaiser Family Foundation, *Employer Health Benefits Survey 2011 Annual Survey* (online at ehbs.kff.org/pdf/2012/8345.pdf).

reform.[3] The individual insurance market was plagued by high costs, low quality benefits, and adverse selection; and the number of uninsured rose steadily to nearly 50 million Americans.[4]

As part of an effort to address these troubling trends, the ACA includes reforms to end long standing insurance company abuses such as arbitrary cancelations of coverage, lifetime limits on coverage, and exclusion from coverage based on preexisting health conditions. The ACA includes policies to increase quality and affordability in the individual health insurance market and creates new health insurance marketplaces in every state where all consumers, regardless of pre-existing health conditions, can shop for coverage and potentially obtain financial assistance to ensure that it is affordable.

To ensure that as many Americans as possible gain the security that comes with health insurance and that the insured public does not have to bear the cost of uncompensated care for the uninsured, the law requires every American to obtain health insurance coverage or pay a tax penalty. This individual responsibility requirement also plays a critical role in keeping the cost of coverage low in the new, non-discriminatory individual health insurance marketplaces.[5]

Because the majority of Americans – 160 million people – already have coverage through their employer and the vast majority of large employers already offer their employees quality coverage, the ACA takes steps to maintain and strengthen the employer-sponsored health insurance system.[6] The law requires larger employers to offer their full time employees quality affordable coverage or, if they fail to do so and one of their employees receives financial assistance through a health insurance marketplace, pay a fine. The requirement applies to businesses that employ more than 50 full time employees, with full time defined as an average of 30 hours per week of work.[7] Because they employ less than 50 people, 96% of all U.S.

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[3] *Id.*

[4] White House Council of Economic Advisers, *The Economic Case for Health Care Reform* (June 2, 2009).

[5] Congressional Budget Office, *Effects of Eliminating the Individual Mandate to Obtain Health Insurance* (June 16, 2010) (online at: http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/eliminate_individual_mandate_06_16.pdf).

[6] Kaiser Family Foundation, *Employer Health Benefits Survey 2012 Annual Survey* (Sept. 11, 2012) (online at kff.org/private-insurance/report/employer-health-benefits-2012-annual-survey/).

[7] Department of the Treasury, Internal Revenue Service, *Patient Protection and Affordable Care Act; Shared Responsibility for Employers Regarding Health Coverage*, 26 C.F.R. Parts 1, 54 and 301 (Dec. 28, 2012) (proposed rule).

businesses are exempt from this requirement.[8] Of those businesses employing more than 50 people, 95% already offer coverage to their employees.[9]

Determining whether an employer was offering quality, affordable coverage to their full time employees necessitates the reporting of wage and health insurance data. Sections 6055 and 6056 of the Internal Revenue Code set out the reporting requirements for employers and insurance issuers.[10] Section 4980H of the Internal Revenue Code sets out the parameters of the employer responsibility requirement.[11]

II. RECENT ADMINISTRATION ACTIONS

On July 2, 2013, the Department of the Treasury announced that it would delay the employer and insurer reporting requirements under Sections 6055 and 6056 as well as the assessment of any employer responsibility payments for one year.[12] This announcement followed extensive outreach and engagement with the employer community, including two formal requests for information by the Department of Treasury on April 26, 2012.[13] Through this process, Treasury "heard concerns about the complexity of the requirements and the need for more time to implement them effectively."[14] Treasury also recognized "that the vast majority of businesses that will need to do this reporting already provide health insurance to their workers," stating that the Department's intention is "to make sure it is easy for others to do so."[15] Treasury

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[8] Kaiser Family Foundation, *Employer Health Benefits Survey 2012 Annual Survey* (Sept. 11, 2012) (online at kff.org/private-insurance/report/employer-health-benefits-2012-annual-survey/) and U.S. Department of Health and Human Services, HealthCare.gov, *Increasing Choice and Saving Money for Small Businesses* (June 27, 2010) (online at www.healthcare.gov/news/factsheets/2010/06/increasing-choice-and-saving-money-for-small-businesses.html).

[9] *Id.*

[10] Pub. L. No. 111-148 §§ 1502 and 1514.

[11] Pub. L. No. 111-148 § 1513.

[12] U.S. Department of the Treasury, *Continuing to Implement the ACA in a Careful, Thoughtful Manner* (July 2, 2013)(online at www.treasury.gov/connect/blog/pages/continuing-to-implement-the-aca-in-a-careful-thoughtful-manner-.aspx).

[13] U.S. Department of the Treasury, Request for Comments on Reporting by Applicable Large Employers on Health Insurance Coverage Under Employer-Sponsored Plans, Notice 2012-33 (Apr. 26, 2012) (online at www.irs.gov/pub/irs-drop/n-12-32.pdf); U.S. Department of the Treasury, Request for Comments on Reporting of Health Insurance Coverage, Notice 2012-32, (Apr. 26, 2012) (online at www.irs.gov/pub/irs-drop/n-12-33.pdf).

[14] *Id.*

[15] *Id.*

also announced that it would issue proposed regulations this summer outlining a newer and more streamlined set of reporting requirements.[16]

On July 9, 2013, the Department of Treasury released additional guidance clarifying the implications of its decision. Treasury stated that its decision did not impact individuals' eligibility for financial assistance – also known as advance premium tax credits – through the marketplaces.[17] Any individual who did not receive an offer of qualifying insurance through their employer would be able to purchase insurance through the marketplace, and, if they qualified based on their income, obtain tax credits to help make this coverage affordable.

Also on July 9, in response to an inquiry from Chairman Upton and others, Treasury clarified its legal authority to delay the employer reporting and responsibility requirements. Treasury stated in a letter to the Committee that the "Notice is an exercise of the Treasury Department's longstanding administrative authority to grant transition relief when implementing new legislation like the ACA. Administrative authority is granted by Section 7805(a) of the Internal Revenue Code," which states that "the Secretary shall prescribe all needful rules and regulations for the enforcement of this title."[18]

The letter noted that "this authority has been used to postpone the application of new legislation on a number of prior occasions across Administration," providing examples of IRS's prior exercise of this authority including delaying penalty assessments authorized under the Small Business and Work Opportunity Act of 2007 and delaying excise taxes reinstated through the Airport and Airway Extension Act of 2011.[19]

III. IMPACT ON AFFORDABLE CARE ACT INCOME AND COVERAGE VERIFICATION REQUIREMENTS

Critics of the Affordable Care Act have raised concerns about the impact that the employer mandate delay will have on Affordable Care Act reporting and eligibility requirements for individuals on the exchange. One prominent critic has written that:

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[16] *Id.*

[17] U.S. Department of the Treasury, Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting), and 4980H (Employer Shared Responsibility Provisions), Notice 2013-45 (July 9, 2013) (online at www.irs.gov/pub/irs-drop/n-13-45.PDF).

[18] 26 U.S.C. § 7805.

[19] Letter from Mark J. Mazur, Assistant Secretary for Tax Policy, U.S. Department of the Treasury to Chairman Fred Upton, et al (July 9, 2013) (online at: democrats.energycommerce.house.gov/sites/default/files/documents/Upton-Treasury-ACA-2013-7-9.pdf).

> the most serious problem for the administration with this delay of the employer mandate: its effect on the viability of the exchanges. Under the law, eligibility for exchange subsidies depends on an individual not receiving an affordable offer of qualified insurance from an employer. If employers will now not be required to report on their insurance offerings in 2014, I don't see how the government will be able to determine eligibility for subsidies, and therefore how the exchanges will be able to function.[20]

With regard to this employer reporting issue, Judy Solomon, Vice President for Health Policy with the Center on Budget and Policy Priorities, described how the decision to delay the mandate would not affect eligibility decisions for exchange participants in 2014:

> [I]n 2014, workers who do not get coverage through their jobs will be able to get good coverage in the new marketplaces, with subsidies available to those with low and moderate incomes … Delaying the employer reporting rules (under which the first reports on whether firms offered coverage in 2014 wouldn't have been due until 2015 anyway) won't affect the information that employed individuals will need to provide to obtain subsidies to help them purchase coverage in the new marketplaces. The application that workers will use when applying for subsidies will include a form that their employers must help them fill out so that the insurance marketplace can determine whether the employer coverage is affordable and adequate. This involvement by employers will go forward on schedule. (If the worker cannot get this information, either because the employer doesn't provide it or for some other reason, the marketplace will make a decision based on the best available information).[21]

On July 5, 2013, the Department of Health and Human Services released a final regulation on program eligibility and other topics.[22] Centers for Medicaid and Medicare Services Administrator Marilyn Tavenner addressed the concerns of ACA critics regarding the accuracy of reported income and coverage information in a "Myth vs. Fact" blog post, stating that:

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[20] Yuval Levin, *Delaying Obamacare*, The National Review (July 3, 2013) (online at nationalreview.com/corner/352657/delaying-obamacare-yuval-levin).

[21] Judy Solomon, Center on Budget and Policy Priorities, *Delay Won't Keep People from Obtaining Health Coverage* (July 3, 2013) (online at www.offthechartsblog.org/delay-wont-keep-people-from-obtaining-health-coverage/).

[22] U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, *Medicaid and Children's Health Insurance Programs: Essential Health Benefits in Alternative Benefit Plans, Eligibility Notices, Fair Hearing and Appeal Processes, and Premiums and Cost Sharing; Exchanges: Eligibility and Enrollment*, 45 C.F.R. Parts 155 and 156 (July 5, 2013) (final rule) (online at: www.ofr.gov/OFRUpload/OFRData/2013-16271_PI.pdf).

> No matter which type of Marketplace is operating in a state, the Marketplace will always check the income information submitted by individuals against electronic income data sources such as tax filings, Social Security data, and current wage information. In most circumstances, we will request additional documentation from all affected individuals, such as when an individual does not have a tax return on file and attests to an income significantly below current wage data. … There are safeguards to ensure that individuals do not fraudulently access premium tax credits. Individuals seeking to purchase insurance in the Marketplace must attest, under penalty of perjury, that they are not filing false information. In addition to the existing penalties for perjury, the health care law applies penalties when an individual provides false or fraudulent information. Moreover, the IRS will reconcile advance payments of the premium tax credit when consumers file their annual tax returns at the end of the year, and it will recoup overpayments and provide refunds when they occur. [23]

IV. WITNESS LIST

J. Mark Iwry
Senior Advisor to the Secretary and
Deputy Assistant Secretary for Retirement and Health Policy
U.S. Department of the Treasury

[23] U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, *Myth vs. Fact: Health Insurance Marketplace on Track* (July 9, 2013) (online at www.hhs.gov/healthcare/facts/blog/2013/07/myth-fact-marketplace.html).